No. 14472

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONSANTO CHEMICAL COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FREDERICK U. REEL,
MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order (R. 36–38)[1] issued against respondent on May 27, 1954, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq.).[2] This Court has jurisdiction under Section 10 (e) of the Act because the unfair labor practices in question took place at re-

[1] References designated "R" are to the pages of the printed record. Whenever, in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following are to the supporting evidence.

[2] The pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 16–18. The Order of the Board is printed in 108 N. L. R. B. No. 151.

spondent's plant near Soda Springs, Idaho, within this judicial circuit.[3]

STATEMENT OF THE CASE

I

The Board's findings of fact

Briefly, the Board found that respondent violated Section 8 (a) (1) of the Act by refusing to permit the International Association of Machinists, herein called the Union, to distribute union literature on respondent's parking lot during the employees' non-working time. The subsidiary facts on which this finding rests may be summarized as follows:

A. Introduction—the location of the plant and the parking lot

Respondent's plant is located on a 500-acre tract of of land about one mile from the limits of the town of Soda Springs, Idaho, a community of about 2,000 inhabitants (R. 8–9; 155–156, 187). The plant, which operates seven days a week on a 3-shift 24-hour basis with a total payroll of about 130 employees, is set back from the highway and is reached by a private company road approximately four-tenths of a mile long (R. 9; 63–64, 125, 164–166). As a driver

[3] Respondent, a Delaware corporation with plants in several States, is engaged in the manufacture of heavy chemicals, organic chemicals, and intermediates. This proceeding involves solely respondent's plant at Soda Springs, Idaho, which annually purchases materials valued in excess of $100,000 of which approximately 75 percent is shipped to the plant from points outside the State of Idaho. In addition, this plant annually manufactures and ships products valued in excess of $100,000 to points outside the State of Idaho. Respondent concedes that it is subject to the jurisdiction of the Board (R. 7–8; 1–2, 4).

approaches the main plant building by the company road, he reaches first a combination administration and service building on the left hand side of the road. Immediately in front of him is the main gate of the plant. To the driver's right, across the road from the administration and service building, is the rectangular parking lot involved in this case (R. 9–10; 109, 188). Employees arriving for work park their cars on the parking lot, walk across the company road, enter the administration and service building to change their clothes and punch the time clock, and then emerge from this building and enter the plant proper by the main gate. When they leave, this procedure is reversed (R. 10; 109).

As cars leave the plant along the company road, they encounter a "stop" sign about 60 feet before they enter the main highway (R. 12; 66, 188, 193). The company road curves in a southerly direction and meets the main highway at an angle of about 30 degrees so that cars which are proceeding to Soda Springs bear only slightly to the right to enter the highway (R. 12; 68, 109–110, 127–129, 188, 193). The terrain is flat and treeless and the view of the main highway, which is very lightly traveled, is unobstructed for a long distance in both directions (R. 12; 111, 193). Consequently, as discussed *infra,* the employees habitually ignore the "stop" sign.

Eighty-eight, or approximately two-thirds, of respondent's employees live in Soda Springs (R. 25; 156, 189–191). The remaining 42 live elsewhere, approximately half of them within a 12-mile radius of Soda Springs, and the other half at a distance of

17 to 39 miles from the plant (R. 25; 189–191). All the employees ride to work in private automobiles (R. 25; 153).

B. The attempt to organize the plant in January and February 1953

On January 22, 1953, A. L. Phelan, a representative of the Union requested permission of resident plant manager Gurvin to distribute union literature, copies of which he handed Gurvin, at the plant gate to the employees as they came off their shift (R. 13; 58–60). Gurvin refused, stating that it was contrary to company policy to permit the distribution of literature on company property (R. 13; 61–62).

Phelan then began a persistent but largely fruitless effort to distribute union literature at the intersection of the company road and the highway. About midnight on January 22, he stationed himself about midway between the "stop" sign and the highway in order to hand literature to employees both entering and leaving the plant at the change of the night shift. Since there were cars both entering and leaving the property at this time, and since most of them carried only the driver, Phelan found it necessary to stand in the middle of the road in order to be in a position to reach the drivers (R. 13–14; 68–69, 106). Phelan discovered, however, that despite the "stop" sign, drivers leaving the plant approached the intersection at the rate of 25 or 30 miles an hour, slowed down only momentarily upon reaching the intersection, and then proceeded immediately into the highway; drivers entering the plant did not slow down at all. None stopped to receive the proffered literature. (R. 14;

69–70.) The following morning Phelan returned to the same spot at about 8 a. m., as the day shift entered the plant, and again in the afternoon when the day shift left the plant. In the morning none of the 25 or 30 cars entering the plant, and only 3 of the 5 or 7 cars leaving the plant, stopped. In the afternoon, Phelan wore a western type hat and a long leather jacket. All but one of the 25 cars that left the plant stopped, and 5 of the drivers told him that they had thought that he was the county sheriff. None of the 7 or 8 cars that entered the company road stopped (R. 14; 74–76, 102).[4] Phelan made a fourth attempt to distribute literature at the intersection on the afternoon of February 9. On this occasion, 2 of the 25 cars leaving the plant stopped, and 3 others were compelled to stop because they were behind these 2. None of the cars entering the plant stopped (R. 14–15; 78–80). Except for the afternoon when he was mistaken for the sheriff, only 8 of the 80 or 90 cars which had passed Phelan on his 4 trips to the intersection had stopped to receive his literature. Phelan found, furthermore, that it was hazardous to stand in the middle

[4] Phelan testified without contradiction that W. T. Dunlap, the production superintendent of the plant, told him in a conversation in September 1953 (see *infra*, p. 7), that the company had had "trouble" with employees not stopping at the stop sign, and that the sheriff "had come out there at different times and stationed himself there," and Phelan understood that some of the employees had been fined for not stopping at the highway (R. 87–88). It may be noted that although cars leaving the company road were confronted with the stop sign, and an individual whom they apparently mistook for the county sheriff upon this occasion, those entering the company road were not confronted with any sign designed to regulate their speed and did not stop.

of the road at the intersection. He testified that on the morning of January 23, the road surface was frozen and slippery, and on the afternoon of that day it was "sloppy" and that he spent much of his time dodging back and forth in an effort to avoid being sprayed with slush (R. 71, 76). On February 9, the ground was covered with snow (R. 78).[5]

Due to the pressure of other duties, Phelan temporarily suspended his attempts to organize the plant after February 9, 1953, and did not return to this task until September 1953 (R. 15; 99–100).

C. The attempted distribution of literature in September and October 1953

In August 1953, the Company promulgated, included in its new personnel manual, and circulated to its employees, rules which prohibited the circulation of petitions, or the posting or distribution of any literature on company property without the approval of the plant manager (R. 10; 137–139, 189).

On September 28, 1953, Phelan and W. T. Wright, the newly appointed business representative of the union (R. 15; 112), handed the guard at the plant gate a sample of some union literature, stating that they wished to distribute copies of this literature to the men at the end of the shift (R. 15; 83–84). The guard stated that this was forbidden by company rule.

[5] Since the events of January and February 1953 occurred more than 6 months before the filing of the charge herein, the Trial Examiner considered such events as background material only (R. 13, n. 1). *N. L. R. B.* v. *Clausen*, 188 F. 2d 439, 443 (C. A. 3), certiorari denied, 342 U. S. 868; *N. L. R. B.* v. *General Shoe Corp.*, 192 F. 2d 504, 507 (C. A. 6), certiorari denied, 343 U. S. 904. The Board's findings are based on the events of September and October 1953 (R. 15–17).

They then asked to see the resident manager, and, in his absence, the guard took them to the office of the production manager, W. P. Dunlap (R. 15; 84). Dunlap refused their request for permission to distribute union literature on the parking area, stating that the distribution of any literature on company property was against company policy, and that if the union were to be granted such permission, other labor organizations would also seek it (R. 15; 86–88). Phelan spoke of the difficulty and hazard of attempting to distribute literature at the intersection of the company road and the highway, and stated that for one thing the cars leaving the property did not comply with the "stop" sign. According to Phelan's uncontradicted testimony, Dunlap replied that he was aware that the company was having difficulty in getting employees to obey the stop sign, and agreed that the company had an advantage in contacting the employees (R. 15–16; 87–88, 98). The interview then terminated and Phelan and Wright stationed themselves at the intersection of the 2 roads and attempted to distribute literature again as Phelan had during the preceding January and February. None of the 5 or 6 cars leaving the plant stopped at the intersection (R. 16; 90–91, 113–114).

On the morning of October 1, Phelan and Wright returned to the plant, parked their car in the parking lot, and began to distribute literature to employees who entered the lot (R. 16; 92–93, 114–115). The guard promptly forbade the distribution and threatened to remove them forcibly from the lot if they per-

sisted (R. 16; 93, 115–116). They left peaceably and returned to the highway intersection (R. 16–17; 94–95, 116). Of the 5 or 6 cars that passed them thereafter, only one stopped (R. 17; 95, 117). That afternoon they returned again to the intersection as the shift was changing. Of the 25 cars that left the plant, 3 stopped; of the 6 or 9 that entered the plant, none stopped (R. 17; 95–96, 118–119).

The Union made no further attempt to distribute literature at the plant gate, on the parking lot, or at the intersection of the company road and the highway (R. 17; 97, 120).

II

The Board's conclusions of law

The Board, dividing 4 to 1 and adopting the conclusions of the Trial Examiner, found that the distribution of union literature at the intersection of the company road and the highway was virtually impossible and at times hazardous, that it was also virtually impossible to distribute literature off company premises, that there were no special circumstances which justified the respondent's rule insofar as it prohibited the distribution of union literature on its parking lot, and that under the circumstances of this case, the application of the rule to bar such distribution constituted an unreasonable impediment to the freedom of communication in the exercise by its employees of their rights to self-organization (R. 26, 34–35). The Board held that respondent, by enforcing its rule to forbid the distribution of union litera-

ture on its parking lot, violated Section 8 (a) (1) of the Act.[6]

III

The Board's order

The Board's order requires respondent to cease and desist from enforcing its rule prohibiting the distribution of union literature on its parking lot during the employees' nonworking time, and from engaging in any like or related acts or conduct which interfere with organizational rights guaranteed by the Act. Affirmatively, the Board ordered respondent to rescind immediately its rule prohibiting the distribution of union literature on the parking lot during nonworking time, to post appropriate notices, and to notify the Regional Director of the Board what steps it has taken to comply with the order (R. 36–38).

ARGUMENT

The Board properly found that respondent's refusal to permit the distribution of union literature on its parking lot to employees on their nonworking time violated Section 8 (a) (1) of the Act

We submit that this case is controlled by *N. L. R. B.* v. *LeTourneau Co.,* 324 U. S. 793, 796–797, 801–803, followed in *N. L. R. B.* v. *Caldwell Furniture Co.,* 199 F. 2d 267 (C. A. 4), certiorari denied, 345 U. S. 957;

[6] Member Beeson dissented on the ground that distribution by other means "was *not virtually impossible*" since the Union could distribute literature at the stop sign, could appeal to the sheriff to enforce the law, and could reach some of the employees in Soda Springs (R. 38–46, emphasis in original). The dissent also adverts to several reasons why the employer could justifiably prohibit distribution at the main gate, a matter which we submit is not in issue here.

N. L. R. B. v. *Carolina Mills, Inc.*, 190 F. 2d 675 (C. A. 4); *N. L. R. B.* v. *Monarch Machine Tool Co.*, 210 F. 2d 183, 184–187 (C. A. 6), certiorari denied, 347 U. S. 967, and cases there cited. These cases hold that, at least where effective alternative means of disseminating literature are not readily available, an employer cannot lawfully prohibit the distribution of union literature to employees on his parking lot outside working hours.

Respondent, necessarily accepting the principle of law just stated, argues for a contrary result here, claiming that the facts of this case establish that the Union had effective alternative means of distributing its literature. We show below that the record as a whole, particularly when read in the light of the facts existing in the *LeTourneau* and other cases cited above, supports the Board's finding that the Union had no such effective alternative.

The Supreme Court's description of the *LeTourneau* property discloses the close parallel between that case and this. The Court stated, 324 U. S. at 797:

> The plant is bisected by one public road and built along another. There is 100 feet of company-owned land for parking or other use between the highways and the employee entrances to the fenced enclosures where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2,100, who are likely to walk across the public highway near the plant on their way to work, *or to those employees who will stop their private automobiles, buses or*

> *other conveyances on the public roads for communications. The employees' dwellings are widely scattered.* (Emphasis supplied.)

With immaterial changes for detail, the above quotation could be a description of the situation involved in the instant case. Here, although some of the employees live in the nearby village, the dwellings of 1 out of 3 are widely scattered. Here, no employees walk to work, and none take buses, and the Union's contact with employees off the company property is limited to those who would be willing to stop their cars on the company road or on the public highway upon approaching or after leaving the company parking lot. The *LeTourneau* holding appears to be squarely applicable here.

Respondent's contention that the Union could have distributed the literature at the intersection of the Company road and the main highway is in the teeth of the Board's finding, amply supported by the record, that distribution at that point was both hazardous and ineffective because the cars went by without stopping. In all the parking lot cases there is some point at which the cars leave the plant property and enter a public street, but the courts have consistently sustained the Board's findings that the hazards and ineffectiveness of distributing literature to moving vehicles renders such intersections an unacceptable alternative to the parking lot as a place of disseminating material. See, e. g., *Monarch* case, *supra,* enforcing 102 N. L. R. B. 1242 at 1249–1250; *Caldwell* case, *supra,* enforcing 97 N. L. R. B. 1501–1502, 1506. Indeed the Supreme Court itself made it clear in *Le-*

Tourneau that the possibility of distributing literature "to those employees who will stop their private automobiles * * * on the public roads for communications" did not justify an employer's rule prohibiting distribution on his parking lot. 324 U. S. at 797.

The record and the decided cases similarly support the Board's rejection of respondent's further contention that distribution of union literature could have been accomplished effectively on the streets of Soda Springs or by mail. The record shows that one-third of the employees do not live in the town, and that 15 percent of them live from 17 to 39 miles outside the community. Under these circumstances distribution on the city streets would have been at best a haphazard proposition, even assuming that the employees wore identifying insignia when in town.[7] And distribution by mail presented no real alternative since the Union had no roster of employees and their addresses (R. 25; 175–177). Moreover, the availability of such a roster would not lead to a different result; similar distribution was possible in the other "parking lot" cases, including the *Caldwell* and *Carolina* cases which involved plants of comparable size, but the courts did not regard the availability of the mails as justifying the employer in denying the Union a right to distribute literature on the parking lot. As the Board said in *LeTourneau,* 54 NLRB 1253, 1261, "It is no answer to suggest that other means of disseminating

[7] Respondent furnished jackets to its employees with the word "Monsanto" emblazoned thereon, but there is no evidence as to the extent to which these jackets were worn in town (R. 25; 182).

union literature are not foreclosed." Indeed in *Le-Tourneau* the Supreme Court observed that there was no evidence and no finding "that the plant's physical location made solicitation away from company property ineffective to reach prospective union members" or that "union organization must proceed upon the employer's premises or be seriously handicapped," 324 U. S. at 798–799.[8]

Respondent's other contentions require little discussion. The fact that the Union acted here through outside organizers rather than through employee members is an insubstantial distinction from *Le-Tourneau,* as the *Carolina* and *Caldwell* cases recognize. The rights protected—that of the employees "fully and freely to discuss and be informed" and the "correlative * * * right of the union, its members and officials * * * to discuss with and inform the employees * * *"' (*Thomas* v. *Collins*, 323 U. S. 516, 533–534)—are not diminished by the circumstance

[8] The Trial Examiner properly distinguished the Board decisions relied on by respondent, *Monolith Portland Cement Co.*, 94 N. L. R. B. 1358; *Mooresville Mills*, 99 N. L. R. B. 572; *Newport News Children's Dress Co., Inc.*, 91 N. L. R. B. 1521; and *Colonial Shirt Co.*, 96 N. L. R. B. 711. These cases stand simply for the proposition that where the union can distribute its literature at the plant but off the employer's property just as effectively and conveniently as it can do so on his property, an employer rule against distributing on his property does not constitute a serious impediment to the freedom of communication and is, therefore, permissible. As the Trial Examiner pointed out, the issue in the *Monolith* and *Colonial* cases was the distribution of literature *in the plant;* distribution on the parking lot, at least in *Monolith*, was permitted. In *Mooresville* and *Newport*, it appeared that unlike the instant case distribution near the prohibited area was effective and convenient.

that the union acted through officials who were no employees. And respondent's suggestion that em ployees passed through the plant gate between th laboratory and the main building carrying phospho rous, a combustible material, is wholly beside th mark, for we are here concerned with distribution o the parking lot, not at the main gate, and with dis tribution during change of shifts, not during workin hours. Respondent's rule, held invalid by the Boarc was not designed to cover only the distribution o literature in dangerous areas around the plant, or it distribution during working hours. On the contrar it covered respondent's entire property and applie at all times during the day. Respondent refused t permit Phelan's distribution of literature on th ground that it was against company policy and on th ground that if the privilege of distribution wer granted Phelan other labor organizations would war the same privilege; the refusal was not premised o any claim of hazardous conditions (R. 86).

We submit that the Board properly concluded tha respondent's right to control the use of its privat property should, in the circumstances of this case, an upon established precedent, accommodate itself to th exercise of its employees' right to self organizatio and that respondent by enforcing a rule forbiddin the distribution of union literature on its parking l on nonworking time, has engaged in conduct violati of Section 8 (a) (1) of the Act.

CONCLUSION

It is respectfully submitted that for the reasons set forth above the order of the Board is valid in all respects and should be enforced.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FREDERICK U. REEL,
MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

DECEMBER 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such tran-

script a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

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